ALLIANCE BANK MALAYSIA BHD v. MENTERI SUMBER MANUSIA, MALAYSIA & ORS

COURT OF APPEAL, PUTRAJAYA
UMI KALTHUM ABDUL MAJID JCA
ABDUL RAHMAN SEBLI JCA
ZALEHA YUSOF JCA
[CIVIL APPEAL NO: W-01(A)-268-07-2016]
2 NOVEMBER 2018

ADMINISTRATIVE LAW: *Judicial review – Appeal against – Appeal against decision of Minister of Human Resources ('Minister') – Bank's clerks given opportunity to apply for position of customer service executives ('CSEs') – Discovery that CSEs continued to perform tasks similar to those performed prior to promotions – Matter referred to Director-General of Industrial Relations ('DGIR') who then referred to Minister – Minister decided that CSEs not employed in managerial, executive or security capacities – Whether Minister in breach of law – Whether Minister acted in excess of power in arriving at decision – Whether Minister required to produce DGIR's report in court – Whether incumbent on Minister or DGIR to refer matter to Director-General of Trade Union first – Whether decision of Minister ought to be quashed – Industrial Relations Act 1967*

The appellant had rolled out a promotion exercise in Peninsular Malaysia where its clerical and special grade clerks were given the opportunity to apply for the position of customer service executives ('CSEs'). A total of 205 clerks accepted this promotion and were employed in the managerial, executive, confidential or security capacities. As they were employed in these capacities, the CSEs (i) ceased to be members of the fourth respondent, the National Union of Bank Employees ('NUBE'), which represented the appellant's employees under the category of clerical, non-clerical and special grade staff; and (ii) became eligible for membership of the Association of Bank Officers, Peninsular Malaysia ('ABOM'), falling within the scope of representation of the same. NUBE later discovered that the CSEs continued to perform tasks similar to those that they performed prior to their promotions, with only an increased sales function. NUBE regarded this as a form of union-busting tactic, by the appellant, as it altered the designation of its staff, from clerks to CSEs, disguised as a promotion, with the aim of excluding these employees from being members of NUBE. This discovery was referred by NUBE to the second respondent, the Director-General of Industrial Relations ('DGIR'), who then carried out an investigation into some of the appellant's branches. The investigation confirmed that the CSEs were not employed in the managerial, executive, confidential or security capacities as they were carrying out the functions of tellers and were still ranked the lowest in the hierarchy of the appellant's employees. The findings of the DGIR were affirmed by the first respondent, the Minister of Human

Resources ('Minister') ('Minister's decision'). The appellant filed an application for judicial review, at the High Court, to quash the Minister's decision. In the midst of the judicial review hearing, ABOM filed to intervene in the proceedings ('encl. 32'). The High Court dismissed the appellant's application for judicial review and encl. 32. Hence, the present appeal. In support of its appeal, the appellant argued (i) the HCJ erred in failing to rule that the Minister's failure to produce the DGIR's report was fatal, as demonstrated in the case of *Hong Leong Bank Bhd v. Menteri Sumber Manusia, Malaysia & Ors* ('*Hong Leong*'); and (ii) it was incumbent on the Minister, or the DGIR, to first refer the matter to the Director-General of Trade Union ('DGTU').

Held (dismissing appeal)
Per Abdul Rahman Sebli JCA delivering the judgment of the court:

(1) The court should not treat judicial review as an appeal. Before the appellate court intervenes, it must satisfy itself that the executive authority, in this case the Minister, had contravened the law by acting in excess of his powers. In the present case, the Minister had not breached the law in deciding that the CSEs were not employed in the managerial, executive, confidential or security capacities. Any reasonable person, similarly circumstanced as the Minister, would have arrived at the same conclusion. There was no evidence that the Minister veered away from the powers vested in him, by the Industrial Relations Act 1967 ('IRA'), or that he had failed to comply with any requirement of the Act. The decision-making process, involving the Minister and the DGIR, had been carried out in due compliance with the relevant provisions of the IRA. (paras 17 & 21-23)

(2) In *Hong Leong*, it was held that the Minister's failure to produce the relevant reports and documents, submitted to him by the DGIR, rendered his decision a nullity. The appellant's reliance on *Hong Leong* was misconceived as the decision in that case must be understood in the context of its own peculiar facts and circumstances. In *Hong Leong*, there was a total absence of material, before the High Court, to enable it to determine whether the Minister had acted reasonably in coming to his decision. There was no such gap in evidence in the present case. In his affidavit in reply, the DGIR in the present case had explained the steps he had taken and the information that he sought from the CSEs before submitting his report to the Minister. The Minister was also under no statutory obligation to provide any reason for his decision, or to produce the result of the investigation carried out by the DGIR. Furthermore, from the grounds of decision of the High Court Judge in the present case, it was clear that he had embarked on an objective and meticulous examination of the factual matrix available before the Minister, which was required of him to do so. (paras 30, 32, 34, 37 & 40)

(3) Neither the Minister, nor the DGIR, gave any reason as to why they did not refer the matter to the DGTU. However, the issue of ABOM's interest in the matter, legal or otherwise, had now become *res judicata* with the dismissal of encl. 32. What had to be determined was not whether it was ABOM, or NUBE, who had the right to represent the employees, but whether the Minister was right in deciding that the CSEs were not employed in the managerial, executive, confidential or security capacities. (paras 45 & 48)

***Bahasa Malaysia** Headnotes*

Perayu telah menjalankan satu langkah kenaikan pangkat di Semenanjung Malaysia dan kerani-kerani perkeranian dan gred khas diberi peluang memohon jawatan eksekutif khidmat pelanggan ('EKP'). Sejumlah 205 kerani menerima kenaikan pangkat ini dan berkhidmat dalam kapasiti pengurusan, eksekutif, kerahsiaan dan jaminan. Oleh kerana mereka berkhidmat dalam kapasiti-kapasiti ini, EKP (i) bukan lagi ahli responden keempat Kesatuan Kebangsaan Pekerja-pekerja Bank ('KKPPB'), yang mewakili pekerja-pekerja perayu dalam kategori perkeranian, bukan perkeranian dan kakitangan gred khas; dan (ii) layak menjadi ahli Persatuan Pegawai-pegawai Bank Semenanjung Malaysia ('PPBSM'), yang terangkum bawah rangkuman pewakilannya. KKPPB kemudian menyedari EKP masih melakukan kerja-kerja sama yang mereka lakukan sebelum kenaikan pangkat mereka, dengan sedikit sahaja fungsi jualan. KKPPB menganggap ini satu bentuk taktik pengurangan kuasa kesatuan, oleh perayu, kerana mengubah jawatan kakitangannya, daripada kerani menjadi EKP, berselindung sebalik kenaikan pangkat, dengan tujuan mengecualikan pekerja-pekerja ini daripada menjadi ahli-ahli KKPPB. Penemuan ini dirujuk oleh KKPPB pada responden kedua, iaitu Ketua Pengarah Perhubungan Perusahaan ('KPPP'), yang kemudian menjalankan siasatan di cawangan-cawangan perayu. Siasatan ini mengesahkan EKP tidak berkhidmat dalam kapasiti pengurusan, eksekutif, kerahsiaan dan jaminan kerana mereka menjalankan fungsi juruwang dan mereka berpangkat paling rendah dalam hierarki pekerja-pekerja perayu. Dapatan-dapatan KPPP disahkan oleh responden pertama, Menteri Sumber Manusia ('Menteri') ('keputusan Menteri'). Perayu memfailkan permohonan semakan kehakiman, di Mahkamah Tinggi, untuk membatalkan keputusan Menteri. Ketika perbicaraan semakan kehakiman, PPBSM memfailkan untuk mencelah dalam prosiding tersebut ('lampiran 32'). Mahkamah Tinggi menolak permohonan semakan kehakiman oleh perayu dan lampiran 32. Maka timbul rayuan ini. Menyokong rayuannya, perayu menghujahkan (i) HMT terkhilaf apabila gagal memutuskan kegagalan Menteri mengemukakan laporan KPPP adalah menjejaskan, seperti yang dinyatakan dalam kes *Hong Leong Bank Bhd v. Menteri Sumber Manusia Malaysia & Ors* ('*Hong Leong*'); dan (ii) wajib buat Menteri, atau KPPP, merujuk hal perkara tersebut pada Ketua Pengarah Kesatuan Sekerja ('KPKS') terlebih dahulu.

Diputuskan (menolak rayuan)
Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:

(1) Mahkamah tidak boleh menganggap semakan kehakiman satu rayuan. Sebelum mahkamah rayuan campur tangan, mahkamah rayuan mestilah berpuas hati bahawa kuasa eksekutif, iaitu Menteri dalam kes ini, bercanggah dengan undang-undang dengan bertindak melampaui kuasanya. Dalam kes ini, Menteri tidak melanggar undang-undang dalam memutuskan EKP tidak berkhidmat dalam kapasiti pengurusan, eksekutif, kerahsiaan atau jaminan. Mana-mana orang munasabah, yang berhadapan dengan hal keadaan sama seperti Menteri, akan membuat kesimpulan sama. Tiada keterangan bahawa Menteri menyimpang daripada kuasa yang ada pada beliau, oleh Akta Perhubungan Perusahaan 1967 ('APP'), atau bahawa beliau gagal mematuhi apa-apa keperluan bawah Akta. Proses membuat keputusan, melibatkan Menteri dan KPPP, dijalankan dengan mematuhi peruntukan-peruntukan relevan APP.

(2) Dalam *Hong Leong*, diputuskan bahawa kegagalan Menteri mengemukakan laporan dan dokumen relevan, yang dikemukakan kepada beliau oleh KPPP, menjadikan keputusan beliau terbatal. Sandaran perayu pada *Hong Leong* satu salah tanggapan kerana keputusan dalam kes tersebut mesti difahami dalam konteks fakta dan hal-hal keadaan tersendirinya. Dalam *Hong Leong,* tiada langsung bahan yang dikemukakan di Mahkamah Tinggi, untuk membolehkan Mahkamah Tinggi memutuskan sama ada Menteri bertindak munasabah dalam mencapai keputusan beliau. Tiada jurang dalam keterangan, seperti sedemikian, dalam kes ini. Dalam afidavit balasan beliau, KPPP dalam kes ini telah menerangkan langkah-langkah yang beliau ambil sebelum mengemukakan laporan beliau kepada Menteri. Menteri juga tidak mempunyai kewajipan statutori memberi apa-apa alasan untuk keputusan beliau, atau mengemukakan hasil siasatan yang dijalankan oleh KPPP. Tambahan lagi, berdasarkan alasan penghakiman Hakim Mahkamah Tinggi dalam kes ini, jelas bahawa beliau telah menjalankan pemeriksaan sebenar dan teliti terhadap rentetan fakta yang dikemukakan pada Menteri, yang menghendaki agar beliau berbuat demikian.

(3) Menteri, mahupun KPPP, tidak memberi apa-apa alasan tentang kenapa mereka tidak merujuk hal perkara tersebut pada KPKS. Walau bagaimanapun, isu kepentingan PPBSM dalam hal perkara ini, bawah undang-undang atau sebaliknya, kini sudah menjadi *res judicata* dengan penolakan lampiran 32. Isu yang perlu diputuskan bukan sama ada PPBSM, atau KKPPB, yang mempunyai hak mewakili pekerja-pekerja, tetapi sama ada Menteri bertindak betul dalam memutuskan EKP tidak berkhidmat dalam kapasiti pengurusan, eksekutif, kerahsiaan atau jaminan.

Case(s) referred to:

Bank Muamalat Malaysia Bhd v. Menteri Sumber Manusia, Malaysia & Ors [2019] 6 CLJ 281 CA ***(refd)***

Exxon Chemical (Malaysia) Sdn Bhd v. Menteri Sumber Manusia, Malaysia & Ors [2007] 2 CLJ 97 FC ***(refd)***

Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***

Hong Leong Bank Bhd v. Menteri Sumber Manusia, Malaysia & Ors [2017] 5 CLJ 675 CA ***(dist)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan and Other Appeals [1996] 1 CLJ 665 CA ***(refd)***

Joseph Puspam v. Menteri Sumber Manusia, Malaysia & Anor [2001] 4 CLJ 252 CA ***(refd)***

Kennesion Brothers Sdn Bhd v. Construction Workers Union [1989] 2 CLJ 569; [1989] 1 CLJ (Rep) 54 SC ***(refd)***

Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors [2009] 6 CLJ 405 FC ***(refd)***

Menteri Sumber Manusia v. Association of Bank Officers, Peninsular Malaysia [1999] 2 MLJ 337 ***(refd)***

Minister of Home Affairs, Malaysia v. Persatuan Aliran Kesedaran Negara [1990] 1 CLJ 699; [1990] 1 CLJ (Rep) 186 SC ***(refd)***

Minister of Labour and Manpower & Anor v. Wix Corporation South East Asia Sdn Bhd [1980] 1 LNS 47 FC ***(refd)***

Minister of Labour & The Government of Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 SC ***(refd)***

Pahang South Union Omnibus Co Bhd v. The Minister of Labour & Manpower & Anor [1981] CLJ 83; [1981] CLJ (Rep) 74 FC ***(refd)***

Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

YB Menteri Sumber Manusia v. Association of Bank Officers, Peninsular Malaysia [1999] 2 CLJ 471 FC ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, s. 9(1A), (1B), (1C), (1D)

Rules of Court 2012, O. 15 r. 6(2)

For the appellant - Sivabalah Nadarajah & Reena Enbasegaram; M/s Shearn Delamore & Co

For the 1st, 2nd & 3rd respondents - Ruzaimah Mohd Ridzuan, SFC & Shazreen Nadia Zulkipli, FC

For the 4th respondent - Malik Imtiaz Sarwar, Andrew Yong & Chan Wei June; M/s AmerBON

[Editor's note: Appeal from High Court, Kuala Lumpur; Judicial Review No: 25-228-12-2014 (affirmed).]

Reported by Najib Tamby

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JUDGMENT

Abdul Rahman Sebli JCA:

[1] Having heard arguments by both sides, we dismissed the appellant's appeal with costs. We found no reason to interfere with the decision of the
B High Court dismissing the appellant's application for judicial review to quash the decision of the first respondent ("the Minister"). Our decision was unanimous and these are our grounds for dismissing the appeal.

[2] The salient facts are as follows. Sometime in 2012, the appellant, a licensed bank under the Financial Services Act 2012 and a member of the
C Malayan Commerce Banks' Association, rolled out a promotion exercise in Peninsular Malaysia whereby its clerical and special grade clerks were given the opportunity to apply for the position of Customer Service Executive ("CSE"), which was categorised under the B1A Grade of employees.

[3] At the end of the promotion exercise, a total of 205 clerks accepted
D their promotions to the position of CSE, which meant they were now employed in the managerial, executive, confidential or security capacities. Their designations were also changed from clerks to junior officers with enhanced roles as reflected in their new job descriptions.

[4] Being employed in these capacities meant that they ceased to be
E members of the fourth respondent, the National Union of Bank Employees ("NUBE"), which represents the appellant's employees under the category of clerical, non-clerical and special grade staff.

[5] In their new positions as CSEs, the promoted clerks became eligible
F for membership of the Association of Bank Officers, Peninsular Malaysia ("ABOM") and that consequently they came within the scope of ABOM's representation and no longer within the scope of NUBE's representation.

[6] This was the trigger that led to the conflict between the appellant and NUBE, with ABOM waiting on the sidelines with keen interest on the
G outcome of the dispute. Thus, from NUBE's point of view, the promotion of these clerks to the position of CSEs has the following consequences:

(i) as the position of CSE is categorised under the B1A Grade of employees, the CSEs could no longer be represented by NUBE as they fall within the scope of ABOM's representation; and

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(ii) as a trade union of employees, the size of NUBE's membership is essential in order to carry out its functions.

[7] NUBE later discovered that the CSEs continued to undertake tasks (such as teller work) that were similar to those that they undertook prior to
I their promotions to the position of CSEs, with only an increased sales function. NUBE saw this as a form of union-busting tactic by the appellant

Bank as it altered the designation of its staff from clerks to CSEs disguised as a promotion, with the aim of excluding these employees from being members of NUBE.

[8] NUBE referred its discovery to the second respondent ("the DGIR") *vide* letter of complaint dated 29 May 2013 in accordance with s. 9(1A) of the Industrial Relations Act 1967 ("the IRA").

[9] Pursuant to s. 9(1B) of the IRA, the DGIR carried out an investigation into the appellant's branches in Selangor, Kuala Lumpur, Johor and Penang to determine whether the CSEs were employed in the managerial, executive, confidential or security capacities.

[10] The DGIR's investigation confirmed that the CSEs were not in fact employed in the managerial, executive, confidential or security capacities as they were effectively carrying out the functions of tellers and were still ranked the lowest in the hierarchy of employees for the appellant. The finding of the DGIR was forwarded to the Minister pursuant to s. 9(1C) of the IRA.

[11] Based on the finding of the DGIR, the Minister on 17 October 2014 decided that the CSEs were not employed in the managerial, executive, confidential or security capacities ("Customer Service Executive (CSE) adalah pekerja-pekerja yang digaji bukan dalam kapasiti pengurusan, eksekutif, sulit atau keselamatan"). The decision was made pursuant to s. 9(1D) of the IRA and was made known to the appellant and NUBE by way of a letter dated 23 October 2014.

[12] Dissatisfied with the decision of the Minister, the appellant filed for judicial review to quash the decision.

[13] In the midst of the judicial review hearing, ABOM filed encl. 32 pursuant to O. 15 r. 6(2) of the Rules of Court 2012 to intervene in the proceedings. ABOM asserted that if the decision of the Minister was maintained:

(i) the appellant will be forced to breach the existing collective agreement it had with ABOM;

(ii) the membership of ABOM will be affected and this would directly or indirectly affect the membership rights of the CSEs involved; and

(iii) the CSEs will be forced to accept a demotion, that is, back to their designation as clerks instead of executives.

[14] Enclosure 32 was opposed by the respondents on the ground that it was made under the wrong provision of the law and that ABOM had no basis to intervene. On 11 May 2016, encl. 32 was dismissed with costs. ABOM did not appeal against the decision.

[15] At the substantive hearing of the judicial review, the appellant submitted, *inter alia*, as follows:

(a) the Minister failed to provide any supporting material in coming to his decision, relying on the decision of this court in *Hong Leong Bank Bhd v. Menteri Sumber Manusia, Malaysia & Ors* [2017] 5 CLJ 675, the facts of which according to the appellant mirror the facts of the present case;

(b) the Minister failed to consider the issue of competency, namely, whether the CSEs were to be represented by NUBE or by ABOM;

(c) the DGIR's investigation was conducted in breach of natural justice and procedural fairness in that the DGIR failed to get the involvement of ABOM in the negotiations;

(d) the Minister and the DGIR failed to appreciate the job functions of the CSEs.

[16] There is no dearth of authority on the principles relating to appellate intervention in the exercise of executive discretion, one of which is the Supreme Court case of *Minister of Labour and The Government of Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 where Hashim Yeop A. Sani CJ (Malaya) delivering the judgment of the court said at p. 198:

> A general guideline on the functions of the Court before the interfering in the exercise of an executive discretion can be found in the judgment of Lord Greene M.R. in the celebrated case of *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] 1 KB 223. The Court can only interfere with an act of executive authority if it be shown that the authority has contravened the law. Secondly the court is not a court of appeal in such matters. Thirdly, the exercise of such discretion is governed by certain principles and so long as the exercise is within the four corners of these principles the discretion is absolute and cannot be questioned in a Court of Law. Lord Greene elaborated on those principles and they are that the exercise of the discretion must be a real exercise of the discretion and that the authority exercising the discretion must consider matters required to be considered and disregard irrelevant collateral matters. If the authority fails to observe these principles, the exercise of discretion cannot be said to be "reasonable". Lord Greene then summed up his guideline as follows:
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> > The power of the Court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confined in them.

[17] It was a reminder by the Supreme Court that the court should not treat judicial review as an appeal. So, the guiding principle is that before the appellate court intervenes, it must satisfy itself that the executive authority (in this case the Minister) had contravened the law by acting in excess of its powers.

[18] Eusoffe Abdoolcader J (as he then was) delivering the judgment of the Federal Court in *Pahang South Union Omnibus Co Bhd v. The Minister of Labour & Manpower & Anor* [1981] CLJ 83; [1981] CLJ (Rep) 74 spoke in similar vein when he said at p. 79:

> We can see no reason or justification for interfering with his decision on an application of the principles governing the scope of judicial review we have adumbrated. The Court cannot substitute its own judgment for that of the 1st respondent and will invalidate the exercise of his judgment or discretion only if satisfied that no reasonable person charged with his statutory responsibilities and with a due and proper appreciation of his statutory duties could have exercised his power in the way that he did (*United Kingdom Association of Professional Engineers & Anor v. Advisory, Conciliatory and Arbitration Service* [1980] 2 WLR 254).

[19] Every power must have legal limits, otherwise there is dictatorship: see *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 per Raja Azlan Shah Ag CJ (Malaya) (as His late Royal Highness then was).

[20] There is authority to say that in cases involving substantial labour relation elements, such as the present case, the courts should generally pursue a policy of restraint: see the Federal Court case of *YB Menteri Sumber Manusia v. Association of Bank Officers, Peninsular Malaysia* [1999] 2 CLJ 471 where the apex court said at p. 473:

> First, we recognise that in the delicate field of labour relations, the High Courts and, indeed, the higher tiers of the Judiciary, should generally pursue a policy of restraint by not involving themselves in issues which move too far from those strict law into those with substantial labour relation elements.

[21] In the present case, having regard to the material before him, we were not persuaded that the learned High Court Judge was wrong in finding that the Minister had not breached the law in deciding that the CSEs were not employed in the managerial, executive, confidential or security capacities.

[22] There was no evidence that the Minister had veered away from the powers vested in him by the IRA or that he had failed to comply with any requirement of the Act. We were satisfied, as was the learned High Court Judge, that the decision making process involving the Minister and the DGIR had been carried out in due compliance with the relevant provisions of the IRA.

[23] We agreed with the learned judge that any reasonable person similarly circumstanced as the Minister would have arrived at the same conclusion. The Minister's decision was clearly made in the spirit of the IRA: *Minister of Home Affairs, Malaysia v. Persatuan Aliran Kesedaran Negara* [1990] 1 CLJ 699; [1990] 1 CLJ (Rep) 186; [1990] 1 MLJ 351.

[24] Both the Minister and the DGIR had gone on affidavit to show that the decision making process was carried out in strict compliance with the law, beginning with the complaint lodged by NUBE under s. 9(1A) of the IRA, followed by the steps taken by the DGIR to resolve the dispute under s. 9(1B) and finally the Minister's decision under s. 9(1D).

[25] The Minister had explained in his affidavit-in-reply how he came to the conclusion that the CSEs were not employed in the managerial, executive, confidential or security capacities. We reproduce below paras. 20 and 21 of his affidavit in reply:

> 20. … Saya seterusnya menyatakan:
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> 20.1 telah membuat keputusan berdasarkan penelitian dokumen serta fakta, laporan di peringkat rundingan yang telah diadakan, hasil penyiasatan Responden Kedua, undang-undang dan arahan-arahan yang berkaitan;
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> 20.2 menegaskan bahawa dalam mencapai keputusan yang telah dibuat, saya telah memberi pertimbangan yang munasabah dan sewajarnya dengan tidak menyokong mana-mana pihak;
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> 20.3 telah mengambil kira segala maklumat dan fakta relevan kedua-dua pihak berdasarkan objektif, aspirasi dan semangat Akta 177 untuk mencapai keputusan yang adil dan saksama;
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> …
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> 21. Selanjutnya, saya sesungguhnya percaya dan menyatakan bahawa dalam membuat keputusan tersebut, saya adalah pihak yang berkecuali dan tidak mempunyai apa-apa kepentingan dalam pertikaian di antara Pemohon dan Responden Kedua.

[26] As for the DGIR, he had explained in detail in his affidavit-in-reply the steps that he had taken and the matters that he took into consideration in carrying out his investigation, as follows:

> 9. … Seterusnya saya melalui surat bertarikh 27.06.2013 telah menetapkan satu mesyuarat bersama Pemohon pada 05.07.2013 bagi mendapatkan penjelasan Pemohon berhubung isu kapasiti pekerja-pekerja yang digaji dalam jawatan Customer Service Executive (CSE).
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> Sesalinan surat Responden Keempat bertarikh 29.5.2013 dan surat bertarikh 27.06.2013 dikemukakan di sini dan ditandakan sebagai "FKP-1"

10. Saya seterusnya telah memohon Pengarah Perhubungan Perusahaan di pejabat-pejabat negeri Selangor (PPPS), Wilayah Persekutuan Kuala Lumpur (PPPWP), Johor (PPPJ) dan Pulau Pinang (PPPPP) (selepas ini dirujuk sebagai "PPPS" "PPPWP", PPPJ" dan PPPPP) untuk mengambil tindakan sebagaimana di bawah subseksyen 9(1B) Akta 177.

11. Selanjutnya saya menyatakan bahawa PPPS, PPPWP, PPPJ dan PPPPP telah menjalankan siasatan bagi menentukan sama ada pekerja-pekerja yang digajikan dalam jawatan CSE termasuk dalam kategori pengurusan, eksekutif, sulit atau keselamatan. PPPS, PPPWP, PPPJ dan PPPPP telah mendapatkan maklumat daripada Pemohon mengenai skop tugas yang dijalankan oleh pekerja-pekerja yang menjawat jawatan-jawatan tersebut dan juga telah menemu bual secara rawak pekerja-pekerja yang digajikan dalam jawatan CSE.

12. Saya seterusnya menyatakan bahawa di antara perkara-perkara yang ditemuduga adalah berkaitan skop kerja (job scope), peranan, tanggungjawab dan maklumat lain berkenaan skop pekerjaan mereka. Tarikh-tarikh siasatan yang telah dijalankan oleh PPPS, PPPWP, PPPJ dan PPPPP masing-masing adalah seperti berikut:

    (i) PPPS telah menjalankan siasatan tersebut pada 09.09.2013, 10.09.2013, 13.02.2014, 19.02.2014 dan 20.02.2014;

    (ii) PPPWP telah menjalankan siasatan tersebut pada 09.09.2013, 10.09.2013, 1.11.2013, 13.01.2014 dan 15.01.2014;

    (iii) PPPJ telah menjalankan siasatan tersebut pada 19.09.2013, 27.01.2014, 28.01.2014 dan 29.01.2014;

    (iv) PPPPP telah menjalankan siasatan tersebut pada 11.09.2013 dan 24.10.2013.

13. Setelah penyiasatan dilaksanakan, PPPS, PPPWP, PPPJ dan PPPPP telah memaklumkan kepada KPPPM mengenai siasatan terhadap aduan di bawah subseksyen 9(1A) Akta 177. Saya telah memaklumkan kepada Responden Pertama di bawah subseksyen 9(1C) Akta 177 berhubung maklum balas siasatan berhubung pekerja-pekerja yang digaji dalam jawatan CSE.

[27] With regard to the duties of the DGIR under the IRA, the following observations by Mohamed Azmi SCJ in the Supreme Court case of *Kennesion Brothers Sdn Bhd v. Construction Workers Union* [1989] 2 CLJ 569; [1989] 1 CLJ (Rep) 54; [1989] 2 MLJ 419 at p. 58 (CLJ); p. 421 (MLJ), paras. C-E, right, are relevant:

> … Whether a dispute arises s. 9(1A) or s. 9(3)(c), the Director-General is empowered under s. 9(4B)(b) to refer the matter to the Registrar for his decision not only on the question of whether the workmen in respect of whom recognition is being sought are members of the trade union, but

A also on any question of competency of the trade union concerned to represent any workman or class of workmen in respect of whom recognition is sought to be accorded. It is only when the dispute cannot be resolved by the Director-General that the matter is referred to the Minister for his final decision s. 9(5), which may include a decision as to who are workmen employed in the managerial, executive, confidential or
B security capacity.

[28] The focal point of the appellant's argument was that the learned judge erred in law in failing to rule that the Minister's failure to produce the DGIR's report was fatal. It was submitted that when the decision of the Minister was challenged by way of judicial review, the reviewing court was
C obliged to undertake an examination of all the materials on which the Minister based his decision and that in the absence of such material, his decision cannot be sustained.

[29] Our attention was drawn to the supporting affidavit of the appellant
D which the appellant alleged was not adequately considered by the learned judge. In the affidavit, the appellant had explained, amongst others:

(i) the role and responsibilities of the CSEs;

(ii) the differences between the job functions of the CSEs and their former clerical functions prior to the promotion;

E

(iii) the job functions of the CSEs;

(iv) that based on the pith and substance of the nature of their work, the CSEs were executives and the fact that they may occasionally or marginally perform teller functions did not mean that they did not
F perform executive functions.

[30] According to counsel, it was the appellant's prerogative to promote any deserving staff. To support his argument that the Minister's failure to produce the DGIR's report was fatal, learned counsel referred us to the decision of this court in *Hong Leong Bank (supra)*. In that case, it was held
G that the Minister's failure to produce the relevant reports and documents submitted to him by the DGIR rendered his decision a nullity.

[31] It was urged upon us that as the facts of that case are on all fours with the facts of the present case, the Minister's failure in the present case to produce the DGIR's report on the outcome of the investigation must likewise
H be held to be fatal. The following passages in the judgment were reproduced by learned counsel:

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[36] We fully agree with learned counsel for the bank that once the decision-making process of the Minister was challenged in a judicial review application, it was incumbent on the Minister to justify the manner by which he came to his decision by exhibiting the relevant reports and documents furnished to him by the DGIR. It was not sufficient for the Minister to make an averment that he had relied on the investigation of the DGIR. In the absence of the reports and documents, the statement of the Minister that he took into account the report of the DGIR was a bare averment.

…

[39] In consequence, we are of the view that the learned High Court Judge erred in failing to consider that the absence of the report of the DGIR referred to by the Minister in his Joint-Affidavit in Reply had resulted in her inability to meticulously examine all the materials that were said to have been before the Minister when he made the impugned decision.

…

[41] The facts before the High Court showed that the DGIR did not affirm a separate affidavit exhibiting his report based on his investigation which he had carried out which was then submitted to the Minister.

[42] Consequently, there was no material before the High Court to enable it to confirm that the Minister had acted reasonably in coming to his decision.

[32] With due respect to learned counsel, his reliance on *Hong Leong Bank (supra)* was misconceived. The decision in that case must be understood in the context of its own peculiar facts and circumstances. What is clear in that case is that there was a total absence of material before the High Court to enable it to determine whether the Minister had acted reasonably in coming to his decision.

[33] The DGIR in *Hong Leong Bank (supra)* did not file any affidavit to explain the steps that he took and the factors that he took into account in investigating the complaint lodged by NUBE. Without such evidence before the court, it would have been impossible for the High Court to determine if the Minister had acted reasonably in coming to his decision. It was principally for this reason that the order of *certiorari* was held by this court to be justified in reversing the decision of the High Court.

[34] There was no such gap in evidence in the case before us. We have earlier referred to the affidavit-in-reply of the DGIR in which he explained the steps he had taken and the information that he sought from the CSEs before submitting his report to the Minister. We refer in particular to paras. 11 and 12 of his affidavit-in-reply.

[35] It was therefore incorrect for learned counsel to say that the facts in *Hong Leong Bank* are a 'mirror image' of the facts of the present case. They are not. It was for this reason that we did not consider the case to be of any assistance to the appellant.

[36] There is a later decision of this court that deals with the same issue. The case is *Bank Muamalat Malaysia Bhd v. Menteri Sumber Manusia, Malaysia & Ors* [2019] 6 CLJ 281. Incidentally, the respondents in that case were the same respondents in the present appeal. It was an appeal against the decision of the High Court dismissing the bank's application for judicial review. In the High Court, Bank Muamalat had argued, *inter alia*, that the Minister had erred:

(a) in failing to produce the material on which his decision had been based, despite the challenge against that decision-making process; and

(b) in failing to refer the complaint to the DGTU to determine the competency of NUBE and Kesatuan Pegawai-Pegawai Bank Muamalat Malaysia Berhad (KEPAK) to represent the relevant employees.

[37] On the issue of the Minister's failure to produce the DGIR's report, the learned High Court Judge held that the Minister was under no statutory obligation to provide any reason for his decision, or to produce the result of the investigation carried out by the DGIR. For this proposition, he relied on the decision of this court in *Joseph Puspam v. Menteri Sumber Manusia, Malaysia & Anor* [2001] 4 CLJ 252 where Mokhtar Sidin JCA delivering the judgment of the court said at p. 258:

> Upon reading *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan and Others Appeals* [1997] 1 CLJ 665, I am of the view that the decision is not the authority where the Minister is compelled to give reasons for his decision. When the Minister refuses or did not give any reasons for his decision that by itself would not nullify the decision.

[38] The decision of the High Court was affirmed by this court on 14 August 2017 but we must state that at the time of writing this judgment, the grounds have yet to be made available. Be that as it may, by affirming the decision, this court must have agreed with the High Court that the Minister's failure to produce the DGIR's report did not nullify his decision. It is inconceivable that this court would have affirmed the decision if it had taken a contrary view.

[39] Perhaps the authority that is most relevant on the issue is the Federal Court case of *Minister of Labour and Manpower & Anor v. Wix Corporation South East Asia Sdn Bhd* [1980] 1 LNS 47; [1980] 2 MLJ 248 where at p. 251, paras. E-H, right, the court said:

> As indicated, we are of the view that the steps taken by the Director-General which led him to making the notification to the Minister do not involve the exercise of judicial functions which would require the application of the rules of natural justice. Even in a case where a Government department is entrusted with judicial duties, as in *Local Government Board v. Arlidge* [1915] AC 120, the House of Lords held that such Government department determining a housing appeal was not obliged to divulge one of its inspector's report to the appellant even though the report might well have contained relevant statements prejudicial to his case which he might have wished to controvert.
>
> In the present case, the Director-General is merely required to notify the Minister where there is no settlement. We agree with the learned trial Judge that a report, if made, is not an official record relating to affairs of State for the purpose of section 123 of the Evidence Act, but this does not make it relevant for the purpose of the present case. Following *Arlidge*'s case, the Director-General or the Industrial Relations Officer conducting the meetings on his behalf is **not obliged to divulge any report he may make to the Minister.** (emphasis added)

[40] From the grounds of decision of the learned judge in the case before us, it is clear that he had embarked on an objective and meticulous examination of the factual matrix available before the Minister, which was required of him to do.

[41] In the Federal Court case of *Exxon Chemical (Malaysia) Sdn Bhd v. Menteri Sumber Manusia, Malaysia & Ors* [2007] 2 CLJ 97; [2007] 3 MLJ 1, Steve Shim CJ (Sabah and Sarawak) in explaining the phrase "meticulous examination of the facts" used by Gopal Sri Ram JCA (as he then was) in *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan and Other Appeals* [1997] 1 CLJ 665; [1996] 1 MLJ 481, said at p. 104 (CLJ); p. 6 (MLJ):

> [4] Quite clearly, the Court of Appeal takes the view that the reviewing court is under a duty to conduct a meticulous examination of the facts placed before the Minister at the material time. There was much debate before us about the words 'meticulous examination of the facts'. In our view, there is no magic in the use of that phrase. It does not set any universal standard. It is not an inflexible term. It merely means that there should be an objective examination of the factual matrix available before the Minister in order to ascertain whether a reasonable person, similarly circumstanced, would have arrived at the decision which the Minister had done. The extent of that duty had been succinctly stated by Abdoolcader SCJ in *Malayan Banking Bhd v. Association of bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204 when he quoted, with approval a statement of Lord Denning HL in the case of *Ashbridge Investments Ltd v. Minister of Housing and Local Government* [1965] 1 WLR 1320 at p 1326:

> The court can only interfere on the ground that the Minister has gone outside the powers of the Act or that any requirement of the Act has not been complied with. Under this section, it seems to me that the court can interfere with the Minister's decision if he has acted on no evidence; or if he has come to a conclusion to which on the evidence he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account or vice versa; or has otherwise gone wrong in law.

[42] The appellant had also raised the point that the learned judge erred in law in failing to rule that the Minister was in error in not referring the dispute to the third respondent, that is, the Director General of Trade Unions ("the DGTU"). It was submitted that this was necessary in view of the fact that there was a competing union representing the same group of employees who were members of the competing union and covered by that competing union's collective agreement with the appellant.

[43] Learned counsel's contention was that it was incumbent on the Minister or the DGIR to first refer the matter to the DGTU for determination as to which union, whether ABOM or NUBE, that was competent to represent the employees concerned. By failing to do so, it was submitted that the Minister had pre-determined the issue, thus rendering his decision a nullity.

[44] The Federal Court case of *YB Menteri Sumber Manusia v. Association of Bank Officers, Peninsular Malaysia* [1999] 2 CLJ 471; [1999] 2 MLJ 337 may throw some light on the point raised by the appellant. At p. 500 (CLJ); p. 363 (MLJ) of the report, this is what Edgar Joseph Jr FCJ said delivering the judgment of the court:

> We recognise, that under s. 9(4B)(b), the Director General has a discretion whether or not to seek the assistance of the Director General of Trade Unions. But, having regard to the rival claims by ABOM and NUBE to represent the relevant officers, and with the Bank strongly supporting ABOM, the Director General should, at the very least, have gone on affidavit to state why he did not pray in aid the views and experience of the Director General of Trade Unions. Had he done so, then we would have known that he had exercised his discretion and on what grounds. We therefore do not consider that he can be taken to have exercised his discretion on the point. Indeed, as we have pointed out, there was no affidavit at all by the Director General.

[45] It is true that in the present case neither the Minister nor the DGIR gave any reason as to why they did not refer the matter to the DGTU but, as rightly pointed out by learned counsel for NUBE, the issue of ABOM's interest in the matter, legal or otherwise, has now become *res judicata* with

the dismissal of encl. 32: *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104; [1996] 2 MLJ 57; *Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors* [2009] 6 CLJ 405; [2009] 6 MLJ 307.

[46] More importantly, in *Menteri Sumber Manusia (supra)*, the dispute was between ABOM and NUBE whereas the dispute in the case before us was not between ABOM and NUBE but between NUBE and the appellant bank. At best, ABOM's interest was only in the outcome of the dispute. Even that has been rendered inconsequential with the dismissal of encl. 32.

[47] It must further be noted that the court in *Menteri Sumber Manusia* was dealing with rival claims by ABOM and NUBE to represent the relevant officers, with the bank strongly supporting ABOM. Again, that is not the case in the present appeal, which only concerns a dispute between NUBE and the appellant bank over the capacity of the clerks who were promoted to the position of CSEs.

[48] What the court had to determine in the present case was not whether it was ABOM or NUBE who had the right to represent the employees, but whether the Minister was right in deciding that the CSEs were not employed in the managerial, executive, confidential or security capacities.

[49] The fatal flaw in the appellants' case in *Menteri Sumber Manusia (supra)* was that the DGIR did not affirm and file any affidavit to state why he did not pray in aid the views and experience of the DGTU, given the rivalry between ABOM and NUBE over the right to represent the employees. Clearly, the facts of *Menteri Sumber Manusia* are different from the facts of the present case, thus making the case irrelevant. In the circumstances, the issue of the Minister's or the DGIR's failure to refer the matter to the DGTU does not arise.

[50] It was for all the reasons aforesaid that we dismissed the appellant's appeal and affirmed the decision of the High Court. We awarded costs of RM10,000 for each set of respondents. The deposit was refunded to the appellant.